Case Number 3663

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UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

TISDALE I. VAN ATTA,

Plaintiff in Error,

vs.

THE MONTANA NATIONAL BANK,
a Corporation,

Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR

Upon Writ of Error to the United States District Court of the District of Montana.

T. F. McCUE
Attorney for Plaintiff in Error
Great Falls, Montana

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STATEMENT OF FACTS:

This case comes to this Court upon a Writ of Error to the United States District Court of the District of Montana.

The case was tried in the lower Court, to the Court and a jury; at the conclusion of plaintiff's case the learned trial court upon motion of the defendant, directed a verdict for the defendant.

For some time prior to the 12th day of June, A. D., 1914, the plaintiff in error and one W. F. Guy,

were joint owners of Six Hundred Seventy-one (671) acres of farm lands located in Rosebud County, Montana. On this date they sold to one Mike Morley and his wife, the land and received in part payment five (5) promissory notes aggregating Eleven Thousand Five Hundred Thirty-five ($11,535.00) Dollars. To secure these notes Mike Morley and his wife executed a mortgage upon the land, these notes being particularly described on Page 78 of the Transcript.

At or about this time the plaintiff in error and the said W. F. Guy were indebted to the First National Bank of Forsyth, Montana, in the sum of Four Thousand Five Hundred Thirty-six and 65/100 ($4,536.65) Dollars; to secure this indebtedness due to such bank, the said W. F. Guy, deposited as collateral security the Morley notes above referred to. At or about this time the plaintiff in error was indebted to the Bank of Montana, of Billings, Montana, on certain promissory notes aggregating Two Thousand One Hundred Fifty ($2,150.00) Dollars. On the 27th day of July, A. D., 1915, the Bank of Montana, was anxious to get the indebtedness of the plaintiff in error secured and on this date, through an arrangement with the officers of the First National Bank of Forsyth, Montana, and W. F. Guy, the Bank of Montana took over from the bank of Forsyth, the indebtedness represented by promissory notes of the plaintiff in error and said W. F. Guy, to the First National Bank of Forsyth and the Morley notes securing the same, the Bank of Montana, paying to the Forsyth bank the amount of the original indebtedness, and thereafter the

Bank of Montana held these Morley notes to secure the notes it acquired from the First National Bank of Forsyth, together with the notes due it from the plaintiff in error.

On June 1st, A. D., 1916, through some manipulation and negotiations, on the part of the Bank of Montana, of Billings, Montana, through its officers and W. F. Guy, W. F. Guy executed and delivered to that bank his individual promissory note for Eight Thousand Two Hundred Twenty-one and 36/100 ($8,221.36) Dollars, which note is set out at Page 14 of the Transcript, and is known in the record as Exhibit 20. This note, Exhibit 20, was delivered by W. F. Guy and accepted by the bank as payment of all the obligations due to it, both by plaintiff in error as a joint debtor with W. F. Guy and his individual obligations. Thereupon the Bank of Montana delivered to said W. F. Guy the note which was acquired by it from the First National Bank of Forsyth, also promissory notes due it from the plaintiff in error, which he owed individually. Thereafter, at or about this time as part of the same transaction said W. F. Guy deposited as collateral security all of the Morley notes to secure this Exhibit 20, his individual obligation to the bank. The matter stood this way until the 23rd day of January, A. D., 1917, when the defendant in error without notice to plaintiff in error of any kind, sold under the collateral agreement with W. F. Guy, all of the Morley notes and bid them in at such sale in its own name. The Bank of Montana, having been previously converted into the National Bank of Montana,

and as such succeeded to all rights of the Bank of Montana in the notes in question.

During all the time herein, plaintiff in error owned an undivided one-half interest in said Morley notes. On account of the alleged sale of the Morley notes under the pledged agreement, the defendant in error claimed thereby to own the mortgage executed by Mike Morley and his wife on the land, heretofore delivered to W. F. Guy and plaintiff in error. Thereafter the defendant in error instituted in the District Court of Rosebud County, Montana, an action to foreclose this mortgage. Pursuant to this foreclosure, on the 8th day of May, A. D., 1918, it secured Sheriff's Deed to the land securing the Morley notes, which Sheriff's Deed is Exhibit 25 in the Record and shown at Pages 90 to 95 inclusive, on the Transcript. Thereafter the defendant in error, and all times since the Sheriff's Deed claimed to be the absolute, unqualified owner of the land.

That at the time the land in question was sold by W. F. Guy and plaintiff in error to said Morley there was a first mortgage upon it for Ten Thousand ($10,000.00) Dollars, the land being particularly described in Exhibit C at Page 25 of the Transcript. This land during the time mentioned herein, particularly 1917 to 1920, is worth in the market One Hundred ($100.00) Dollars per acre or about Sixty-seven Thousand ($67,000.00) Dollars, so that the defeendant in error through the manipulation with W. F. Guy, acquired this land at an actual outlay of between Nineteen Thousand ($19,000.00) Dollars and Twenty Thousand

($20,000.00) Dollars, including interest, costs and attorney's fees.

At no time did the plaintiff in error have any notice or knowledge of the pretended sale of the Morley notes made by the defendant in error on the 23rd day of January, A. D., 1917, until the latter part of March, A. D., 1920, then he was advised for the first time of this transaction. Thereupon he caused demand to be made upon the defendant in error for his one-half interest in these Morley notes. This demand is shown by Exhibit No. 2 (Trans. P. 42.) His demand was immediately denied as shown by Exhibit No. 1, (Trans. P. 44).

The only partnership that ever existed between the plaintiff in error and W. F. Guy, was the land in Rosebud County, Montana, securing the Morley notes. All of these partnership matters were fully settled before the commencement of this suit.

(Van Atta's Testimony, Trans. 69-70.)

"The property was owned by Mr. Van Atta and myself. The obligations and debts of Guy and Van Atta have all been settled. I think they were all settled prior to 1917. We had a settlement settling up all our partnership relations in regard to all debts, and things pertaining to the partnership. We had a settlement prior to 1917, I think. It might also have been the fore part of 1917. The Great Falls property was the last piece of property that our partnership owned. Van Atta sold his interest in that property to my wife. That was about 1917, and that wound up everything in connection with the partnership. The T. I. Van Atta notes that I got from the Bank of Montana, and also the note of $1,500.00 signed by T. I. Van Atta are still a claim against Mr. Van Atta and they are not paid. All of the rest of

the matters of the partnership business has been cleaned up and adjusted. To my (68) knowledge they were all settled. I was a party to the settlement. There are no outstanding partnership obligations or partnership property between myself and Van Atta unless oyu consider the Morley notes are not settled. I am not claiming any interest in the Morley notes. My interest in the Morley notes was taken over by the bank. I am making no claim whatever as to any interest in these Morley notes."

(W. F. Guy's Testimony, Trans. 83.)

Thereupon and immediately after the service of this demand and refusal, the plaintiff in error commenced this action in trover against the defendant in error for the conversion of his one-half of the Morley notes hereinbefore set forth.

The material proposition involved, or rather the point upon which the learned trial Court determined this case and directed the verdict, is based upon the contention that this cause of action involves patrnership relations and that plaintiff has pursued the wrong remedy; that his remedy was one by a bill in equity for an accounting.

The plaintiff in error claims that the following facts are established by the evidence introduced upon the trial, which are confessed as a variety by a motion for a directed verdict:

(a) That the plaintiff in error was, at all times since their execution and delivery, the owner of one-half of the promissory notes in controversy.

(b) That the defendant's claim of ownership of such notes is based upon a pledge agreement made by one W. F. Guy with the Bank of Montana, to secure his

individual note dated July 27, 1915, for $8,221.36, being Exhibit 20 in this record, (Trans. 79.)

(c) That the Bank of Montana, prior to January 16, 1917, was converted from a State Bank to a National Bank under the name of the Montana National Bank, the defendant herein (Paragraph 7, Exhibit 12, Trans. P. 64.)

(d) That the partnership of Guy and Van Atta was dissolved and fully settled before the commencement of this action and that there are no unpaid or outstanding obligations of this partnership.

(e) That the defendant received and accepted Exhibit 20, in full payment of all of the partnership liabilities to it and also the plaintiff's individual indebtedness (Defendant's Answer, Paragraph 6, Trans. Pp. 13-14-15.)

(f) That the defendant is not the owner or holder of any claim, either of an equitable or a legal nature—against the former partnership of Guy and Van Atta, nor against the plaintiff individually.

From the foregoing admitted facts which stand as a variety in the record, under the motion for a directed verdict the plaintiff claims the following propositions of law obtain—and must be applied to this case:

(1) That the proof and the admissions in the Answer of the defendant constitute conversion of plaintiff's interest in the notes in controversy.

(2) That this conversion took place on April 1, 1920, when defendant denied plaintiff's right and interest in the notes; that plaintiff's cause of action did

not accrue until after April 1, 1920. Exhibits 1-2, (Trans. Pp. 42-44.)

(3) That an action for an accounting of the partnership in a court of equity against the defendant and the co-partnership could not be maintained in a court of equity for the reason that there were no partnership obligations involved, and the plaintiff's remedy is plain, speedy and adequate at law, being the suit for conversion as brought and prosecuted in this case.

(4) That upon the record in this case the value of the notes converted is their face and interest as provided therein; that the value of the same not being denied by the defendant's evidence, upon conversion, the presumption of law is that the value of promissory notes is that of their face or what they call for.

ASSIGNMENT OF ERROR.

The plaintiff in the above entitled action submits that there is manifest error in the record herein, and assigns the following as such:

I.

The court erred in overruling the plaintiff's objection to the question asked upon cross examination of plaintiff as follows:

Yes, in your letter of August 27, 1916, you say, "as I understand the matter, however, it is all eliminated Guy giving you his note for the whole thing." You knew that a considereable time before you saw Mr. McCue in Seattle, or in Washington some place, that your

interests in these notes had been forced or sold out under the collateral pledge agreement, did you not?

The Court: Sold out under what agreement?

Q. Under the agreement, pledge agreement, with Dr. Guy and also the pledge agreement with the First National Bank of Forsyth.

Mr. McCue: At this time we object to this line of evidence as being incompetent, immaterial, and there is no proper evidence going to show that any foreclosure was ever made as outlined in the evidence thus far, and is calling for conclusion, opinion, of the witness on a matter that is not within the issues of this case, and also that the inquiry is not proper cross examination.

The Court: He testified he did not know until he met counsel of plaintiff, and his ownership, that is one of the main issues in the case. The question is proper cross examination. He may answer. Overruled.

Exception noted and allowed (Trans. P. 56.)

II.

The Court erred in overruling plaintiff's objection to the following question:

Q. "This last Exhibit reads as follows: 'The only answer that we can make as the matter now stands, is that Dr. Guy was indebted to the Bank of Montana for about $8,000.00 and as security for that Dr. Guy put up with the Bank of Montana the Morley notes. Dr. Guy failed to pay the note when due and the collateral was then sold by the bank, so that, as it now stands, the bank is the holder of the Morley notes.'" You knew on that date, or a few days after that, that

the Bank of Montana had taken over the Morley notes from Dr. Guy, did you not?

Mr. McCue: Objected to as argumentative and incompetent and intended to place a construction upon a plain letter.

The Court: He can answer if he can; objection overruled. I think he will make more progress if he can rely on the language of the letter.

Exception noted and allowed (Trans. P. 57.)

III.

The Court erred in admitting the following evidence, over the plaintiff's objection:

Q. Did you redeem under the sale of the first mortgage?

Mr. McCue: Objected to, incompetent, immaterial, and irrelevant, furthermore, there was no obligation in view of the records in this case, the plaintiff's notes having been converted, no obligation for him to redeem.

The Court: He may answer.

Exception noted and allowed.

A. No.

Q. You never made any effort to, did you?

Mr. McCue: Same objection as above.

The Court: Like ruling.

Exception noted and allowed.

A. No sir.

Q. Did you ever inquire as to what amount it would take to redeem?

Mr. McCue: Same objection as last above.

The Court: I doubt whether the details are material. He may answer.

Mr. McCue: Note an excepetion (Trans. Pp. 67-68.)

IV.

The Court erred in sustaining the defendant's objections as follows:

A. I understood as stated; I understood that the Bank of Montana had taken over those papers or securities from the First National Bank of Forsyth. Inasmuch as they had—May I ask this, your Honor?

The Court: Proceed.

A. (Cont'd) Inasmuch as they had agreed to protect me and take care of my interests—

Mr. Grimstad: To which we object when the agreement between him and the bank protecting his interest is not in question, nothing in writing shown, and nothing here to indicate that the plaintiff is suing for an account—about wrong of any rights he may have had.

The Court: Objection will be sustained.

The Great Falls property was settled between Dr. Guy and myself.

Q. Have you got any accounts pending now, any partnership accounts, that is, with any bank in the name of the firm, or did you have at the time of the commencement of this action?

Mr. Grimstad: Objected to as incompetent, irrelevant and immaterial, nor proper redirected examination.

The Court: Sustained.

Exception noted and allowed. (Trans. 69.)

V.

The Court erred in sustaining the defendant's objection to the introduction of the following evidence:

Q. Tell the jury what was said between yourself and Mr. Langworthy.

Mr. Grimstad: That is objected to, incompetent, irrelevant, and immaterial.

The Court: What is the object of this?

Mr. McCue: The object, if your Honor please, is that in the pleadings, and in a way, in cross examination, it has been claimed by the defendant in this case that there was a sale, a foreclosure in that transaction and our contention being that the Bank of Montana merely succeeded to the interests of the First National Bank of Forsyth that it did not in fact constitute a foreclosure or an extinction of the title to the collateral security in the plaintiff.

The Court: The objection will be sustained.

Exception noted and allowed.

Q. What was done when you got down to the First National Bank of Forsyth, by yourself and Mr. Brown, a member of the firm of Grimstad & Brown, representing the Montana National Bank—Bank of Montana, and the officers of the bank, and the First National Bank of Forsyth?

Mr. Grimstad: Objected to as immaterial.

The Court: The objection will be sustained. If ever anything of this sort will be material, it is not now.

Exception noted and allowed.

A. After my return from Forsyth I went over to the Bank of Montana by pre-arrangement.

Q. What was done there, if anything, with reference to the notes involved in this lawsuit?

Mr. Grimstad: That is objected to, incompetent, irrelevant and immaterial.

The Court: What is the object of this?

Mr. McCue: I want to show the actual transaction that took place, along the line that we contend for in this lawsuit, that the taking over of the notes by this witness, and the re-pledging of them was a transaction without any sale and still preserved the title in the plaintiff to the notes in question.

The Court: I find nothing in your complaint. You start off with the fact that these two men owned these notes and that this plaintiff pledged them for his debt.

Mr. McCue: That is true; we take it this is a part of the evidence?

The Court: Proceed; objection sustained to the last question.

Exception noted and allowed. (Trans. P. 71.)

VI.

The Court erred in sustaining the defendant's motion for a directed verdict.

(Trans. 109.)

VII.

The Court erred in entering judgment against the plaintiff herein.

(Trans. 36-37.)

The foregoing assignments of error are made and

based upon Section 6784 R. C. Montana as amended by Session Laws of 1915, shown on Page 721, Vol. 3, Supplement 1915, and the following record made by the court upon the trial is shown upon Page 26 of the transcript, to-wit:

Mr. McCue: Pardon me. May I ask if it is necessary to take exceptions in this court, or does the Court grant an exception to each adverse ruling?

The Court: We are following the state practice in actions, if you get them in state actions, I presume you get them here.

The Section above referred to reads as follows:

"Every order, ruling and decision of any kind or nature, and every verdict, finding, decree or judgment is to be deemed excepted to, and it shall not be necessary to ask for or note an exception, and no bill of exceptions need be settled or filed except where and when hereafter expressly required by law or by a rule of the Supreme Court."

ARGUMENT.

Taking up the first assignment of error, we believe that the learned Court erred in sustaining defendant's objection to the question shown under this assignment for the reason that there was nothing asked in chief of the plaintiff about a pledge agreement with the First National Bank of Forsyth, and it was not proper cross-examination. It infused into the record matters of defense which the plaintiff would have a right to offset by rebuttal. The inquiries in chief were made entirely to the sale by the defendant under Guy's pledge agree-

ment, and the alleged sale made on January 23, 1917. We believe that this was clearly error.

Assignment of error two (2) comes under the same head and we think the same is well taken.

We believe also that assignment of error three (3) is well taken.

Taking up assignment of error four (4), it will be seen that the Court permitted the defendant to cross examine the plaintiff with reference to whether or not the partnership of Guy and Van Atta was in existence and Van Atta inadvertently testified that there were partnership matters. This was not proper cross-examination, nor was it admissible under the state of the record, but in view of the fact that the Court permitted this cross-examination, the same became the law of the case, and we had a right to show the facts and the truth of the matter. On redirect and since the Court allowed the defendant the right to cross-examine into the question of the partnership, it seems to us that we had the absolute right on redirect to ask the questions shown upon Page 71 of the Transcript, as noted under the head of this assignment.

These rules are so well established that we do not believe it is necessary to cite any authority in this Honorable Court to sustain this position.

Discussing assignment of error five (5), the Court permitted the defendant to cross-examine the plaintiff with reference to the transaction with the First National Bank of Forsyth. This was merely matters of defense and could not be brought out upon cross-examination because that transaction was not gone into in

chief, but in view of the fact that the Court permitted such cross-examination, this procedure became the law of the case and we undoubtedly had the right to show that the transaction between the Bank of Montana and the First National Bank of Forsyth consisted merely of the Bank of Montana taking over the indebtedness and the pledge notes and that there was not, in truth and in fact, any sale or attempted sale of the pledged property in that transaction. By the evidence that we sought to introduce under this assignment of error, it would show the transaction as it was, and if we were permitted so to do, we would have shown that the Bank of Montana bought the debt and that the security, the pledged notes, passed as an incident, and that there was no sale or foreclosure in fact made in that transaction. It seems to us that the position of the Court in these respects constitutes error.

We will discuss assignments of error six (6) and seven (7) under the one head; these assignments being so closely allied that a discussion of one, particularly the motion for a directed verdict, will present the matter of the assignment of error on account of the entry of judgment. Where land is the only subject of the partnership, the sale of the property dissolves the relations of the partnership between themselves.

Thompson v. Bowman, 6 Wall, 316 L8 Law Ed. 736.
Gas and Oil Co. v. Thomas, 51 NE. 351.

The Bank of Montana and its successor, the defendant, knew that the land securing the notes in controversy was the only subject of the partnership, their

answer and the evidence shows this conclusively, so that they are bound to know that the sale of the land dissolves the partnership.

If a partner, after dissolution, draws notes in the name of the firm, payable to himself and then endorses them to a third party for a personal and not a partnership consideration, the first endorser cannot maintain an action upon them against the firm, if he knew the notes were antidated.

Smith v. Strader, 4 How. 404, 11 Law Ed. 1031.
In Re: McIntire 132 Fed.

The analogous point of the case at bar to the last law above cited, is that the note (Exhibit 20), for $8,221.36 was Guy's personal obligation, and it follows as held in Smith v. Strader supra, that the bank cannot maintain an action upon this note against the firm of Guy and Van Atta. Not only that, but by the defendant's answer, it is alleged and admitted in Paragraph VI, thereof, that this note was executed, delivered and accepted by the bank in payment of all prior obligations, which obligations are specifically enumerated and described therein. Besides, the bank has stood upon this note and pursued its remedy thereon, all of which is conclusively shown in the evidence, and also that this note constituted payment.

Exhibit Number V, (Trans. 76.)

Shows that this note given by Guy was in full satisfaction of all claims the bank had against the plaintiff in error and against Guy and Van Atta jointly. This exhibit shows that Guy and the bank were colluding together to carry on some deal whereby they could

profit to the determent of the plaintiff in error; under this exhibit some sort of an action was commenced and the case was agreed to be dismissed against W. F. Guy and the bank was to proceed with the case against Van Atta, bid in the property for the use and benefit of Guy. Evidently the bank was proceeding to give Guy an opportunity to collect the indebtedness due him from the plaintiff in error, out of the attached property, and at the same time the defendant in error was holding the plaintiff in error's half interest in the Morley notes. It is not always easy to uncover a scheme of this kind, but there was sufficient evidence upon the question of collusion between the bank and Guy to go to the jury, and it seems to us that this exhibit is evidence in itself of that fact, and while we cite it as additional evidence of the fact of the payment, we allude to the collusive part to show that both Guy and the bank had some private understanding whereby they were to acquire Van Atta's property.

The effect of payment is to extinguish the obligation and everything accessory thereto to liberate from it all the debts.

Wright v. Mix, 76 Cal. 465, 18 Pac. 646.
Armstrong v. Caesar, 72 Ind. 280.

The giving of the note (Exhibit 20) constituted an accord, (Section 4954 R. C. 1907 Montana.) The acceptance of the note by the bank constituted a satisfaction of the debt (Section 4956 R. C. 1907, Montana.) The bank substituted this note for all the original obligations and that constituted a novation (Section 4958 R. C. 1907, Montana.)

Phillips v. State, 109 Ga. 115.
Richardson v. Gregory, 126 Ill. 166.
Gould v. Banks 8 Wend. 562, (N. Y.)
Ferguson v. Baker, 116 N. Y. 257.

From the foregoing facts and authorities cited, it follows as a legal and a logical conclusion that neither the plaintiff nor the firm of Guy and Van Atta, were in any way indebted to the defendant at the time of the commencement of this action; that being true, the defendant is not entitled to raise the question as to whether the partnership has been settled. Consequently, the learned trial Court had no jurisdiction to determine whether the partnership is settled or unsettled, because under the Answer and the admitted facts, that question is wholly immaterial. A party must show a right in order to have a matter inquired into in a court of justice; the defendant not being a creditor of the firm of Guy and Van Atta, and it having admitted in its Answer that Exhibit 20 was accepted as payment, of all the partnership indebtedness, whether the partnership was dissolved is clearly a mooted question; that plaintiff's rights in this case cannot be adjudicated by the determination of mooted questions is too elementary to require the citation of authority in this court.

It is also admitted or rather pleaded as a fact in the Answer, that Exhibit 20 paid all plaintiff's indebtedness to the defendant, (Answer, Paragraph VI), so that plaintiff not being indebted to the defendant, he was not required to make any tender of payment. Therefore, the question of tender of payment is equally immaterial. A party must owe something before he can be called upon to tender it.

The defendant cannot plead ownership to the exclusion of plaintiff and claim an equitable lien at the same time. Under Section 5725, R. C. 1907, Montana, which reads as follows:

> "The sale of any property on which there is a lien, in satisfaction of the claim secured thereby, or in case of personal property, its wrongful conversion by the person holding such lien, extinguishes the lien forever."

When the defendant sold the notes to satisfy the claim, it, under this Section, lost its lien on the notes.

The above Section of our Code was adopted from the Code of California, and its construction is clearly settled by the case of Chase v. Putnam, 117 Calif. 368 49 Pac. 204.

The pretended sale of the notes in controversy made by the defendant on January 23, 1917, was not made pursuant to any pledge agreement with plaintiff, so plaintiff was entitled to insist that the Montana Statutes, Section 5709, which requires actual notice and Section 5793, which provides that the sale must be public auction in the manner specified, and Section 5794, which prohibits the sale of pledged securities such as the notes in question, and Section 5798 which prohibits the pledgee from buying the pledged at his own sale. The Vendor not having complied with any of these statutory requirements, the pretended sale constituted a conversion of the plaintiff's interest in the notes, since it claims individual ownership of these notes to the exclusion of plaintiff's interest.

When Guy pledged the notes under the facts and pleadings, as a matter of law he only pledged his in-

terest, or one-half of them. Rogers v. Bachelor; 2 Pet. 221, 9 Law. Ed., 1066.

A joint owner or a partner cannot pledge the joint property to secure his individaul obligation. Such a transaction merely pledges such individual interest.

Blair v. Harrison 57 Fed. 257, 6 CCA 326.
Claflin v. Bennett 51 Fed 693.
Rogers & Son v. Bachelor U. S. 9 L. Ed. 1063.
Russell v. Allen, 13 N. Y. 173.
Frans v. Young 24 Ia. 376

"Any sale unauthorized by law or consent of the owner which deprives him of personal property is actionable conversion." 38 Cyc. 2026.

The defendant, under Guy's pledge agreement, sold the notes and by so doing it could only sell Guy's interest in them. Consequently, when it bid in these notes, it became a co-tenant with plaintiff. This sale in itself did not constitute a conversion of plaintiff's half of these notes. (Paragraph X Answer.)

After the year of redemption expired in September, 1918, it took deed (Exhibit 25) to the land in its own name. These proceedings in themselves, under the well established authortiy cited, did not constitute conversion of plaintiff's inteerst in the notes, because all of those proceedings, though they result in extinguishing Guy's interest, they would keep intact the plaintiff's interest. Therefore, no conversion took place until the demand (Exhibit 2, Trans. Page 42) was made on March 27, 1920, and the reply, (Trans. Page 44), which denied any right in plaintiff and the claim of ownership in the defendant. Then, by its answer in the case, defendant claims absolute ownership, which constitutes

such an abuse of a co-tenant's property for which trover will lie against such co-tenant.

Permiter v. Kelly, 18 Ala. 716, 54 Am. Dec. 177.
King v. Neel, 98 Ga. 438; 58 Am. St. Rep. 311.
Wheeler v. Wheeler, 33 Maine, 348.
Cooley v. Torts, (2nd Ed) P. 533.

The Supreme Court of North Dakota in the case of Anderson v. Bank, 5 N. D. 83, by Corless, Judge, says:

"The defendant having assumed to own and control these notes, by reason of an illegal sale and void purchase thereof, converted them to its own use and became liable for their value * * * Its position was on this argument, that it owned them.

The defendant, in the case at bar, has pleaded absolute ownership, which constitutes conversion under the facts. The courts of Massachusetts, New York and Illinois, hold that where one co-tenant claims independent ownership of the joint property, the other tenant may maintain trover.

Weld v. Oliver, 21 Pick., (Mass.) 564.
Delaney v. Root, 99 Mass. 546; 97 Am. Dec. 52.
Needhom v. Hill, 127 Mass. 133.

A sale of the joint property which ignores and denies the right of the oc-tenant furnishes sufficient proof of conversion.

A co-tenant may make such use of his co-tenant's property that will constitute conversion. The case particularly in point is the case of Clow v. Plummer, (Mich.) 48 N. W., 795. The Michigaan court at the last part of the opinion says: "The argument of counsel for the defendant is that it is admitted by the pleadings that the defendant was a tenant in common with the plaintiff; that it is shown by the evidence, that the

property, (the timber converted) was in danger of destruction by fire and other causes; and no sufficient demand having been made, if the plaintiff had a right of action, it was an equitable action for an accounting, and that the defendant should not be charged with wrongdoing. As we have said, we think all the demand necessary, under the circumstances, to have been made, was made. The fact that the timber was liable to destruction by fire was no sufficient reason in law to authorize the defendant to cut, take away and manufacture the common property. One tenant in common has no right over the property of his co-tenant. The defendant had an undoubted right to compel the partition of the common property, but he had no right as co-tenant over the undivided interests.

"The fact that at the time of the commencement of this suit defendant yet had in his possession some of the lumber manufactured from logs taken from this land, and yet undisposed of, would not prevent the plaintiff from bringing and maintaining trover. Manufacturing Co. v. Barnard, ante. 280. Under this view of the case the court was not in error in its instructions to the jury upon the question of damages. The judgment must be affirmed, with costs. The other justices concurred."

Another case in point is the case of Grisbgy & Day, (S. D.) 70 N. W. Rep., 81. The Supreme Court of South Dakota in the last part of the opinion, says:

> "The next contention of appellant is that there was no conversion of the commission notes and mortgages and that the referee erred in so finding. As will have been observed, all these notes and mortgages

were taken in the name of defendant, but the referee finds that the plaintiff had a one-half interest in them. They were, therefore, tenants in common as to these notes and mortgages, notwithstanding, they were taken in the name of the defendant. The rule seems to be established in this country that if one tenant in common sells or disposes of the chattels his co-tenant may maintain trover against him for their conversion, and recover the value of his interest therein. 4 Am. & Eng., Enc. Law, P. 114. See also cases cited. Judge Cooley in his work on Torts takes the same view and cites a large number of authorities. Cooley, Torts, (2nd Ed) P. 533; Delaney v. Root, 99 Mass. 546; Dyckman v. Valiente, 42 N. Y, 549; Weld v. Oliver, 21 Pick. 599; Lovell v. Insurance Co., 111 U. S. 264, 4 Sup. Ct. 390; Reusens v. Construction Co. 22 Fed. 522; Wilson v. Reed, 3 Johns 174; Tyler v. Tyler, 8 Barb. 585; White v. Brooks, 43 N. H. 402; Bent v. Barnes, (Wis.) 64 N. W. 428; Anderson v. Bank, (N. D.) 64 N. W. 114; Downs v. Finnegan (Minn.) 59 N. W. 981; Moore v. Baker (Ind. App.) 30 N. E. 629.

"The appellant contends that the assignee only acquired the interest of the defendant in these notes and mortgages by the assignment, and that the plaintiff's remedy is against him, and the plaintiff may assert his right also against the property in the hands of the assignee. We do not deem it necessary to decide either of these questions in this case. Assuming, as contended that plaintiff might have a right of action against the assignee, and might have a remedy as against the property, still the plaintiff retains his remedy as against his co-tenant. The law does not impose upon the plaintiff the duty of proceeding against the assignee or the property. When the defendant transferred these notes and mortgages to the assignee unconditionally, and put them beyond his control, he, in law, converted them, and became liable to the plaintiff for the value of his interest therein in an action against him. We are of the opinion, therefore, that the referee correctly held that the action

for conversion could be maintained against the defendant."

The evidence conclusively shows all partnership matters of every kind and character existing between the firm of Guy and Van Atta, including all obligations, and debts, were settled prior to 1917.

(Trans. 69-70 Van Atta's Testimony.)
(Trans. 83 Guy's Testimony.)

The facts going to show that all partnership matters were fully settled and closed before the commencement of this action are set out in full in statement of facts and it is unnecesary to repeat the same here. Suffice it to say that the evidence shows conclusively that the partnership affairs were fully adjusted and settled and that there are no partnership matters pending; no accounting to make. The only matter that ever belonged to the partnership or had any connection with it is the plaintiff in error's half-interest in the Morley notes.

Notwithstanding the learned trial Court conclusions for granting the motion for directed verdict, this record is conclusive and undisputed that there are no matters to reach by a bill in equity for an accounting of the partnership affairs. On the contrary the plaintiff's remedy was plain, speedy, adequate remedy at law, being one for conversion, and bill in equity for accounting would not lie; it would be met at the threshold with objection that plaintiff had a full, complete, speedy, and adequate remedy at law and would be compelled to pursue this law remedy.

The defendant must stand or fall upon its claim

of ownership. It certainly would be an anomily for defendant, after alleging ownership and title to the property in controversy, to be heard to say because at one time it was partnership property we are denied the right to maintain trover in a court of law, and that we must go into a court of equity and ask for an accounting; that this without a shadow of an equitable defense or an allegation in its answer claiming any of the rights of a partnership, or that it is a creditor of the partnership.

We have heard of the fiction of the law for a good while, but this sort of fiction is too deep for us. It seems to us that it amounts to saying that one who secures property by stealth, when sued for its value could defeat the action on the ground that an accounting is the only remdey.

It must be remembered that we are discussing this feature of the case in the light of the record of this case. The complaint, which alleges ownership in plaintiff; the answer which alleges unqualified ownership in defendant, which is based upon a sale made on account of a pledge not by the partnership, but by Guy individually, to secure his personal obligation, which did not in any manner attempt to bind the partnership. Had the defendant plead equities that only could be determined by an accounting of the partnership affairs, or had they shown that they succeeded to any of the partnership rights, then there might be some excuse for the claim that this action must be brought in a court of equity for an accounting of the partnership.

Upon the face of the pleadings in this case and

upon the evidence introduced, a suit in equity by the plaintiff could not be maintained because it is too elementary to permit of any discussion that where one has a plain, speedy, adequate remedy at law, he must pursue his law remedy and cannot come into a court of equity. Besides, the defendant having by its acts as shown by its Answer foreclosed its right to claim any equities against Van Atta by accepting Guy's individual note as payment of the former's obligations, how can the defendant now claim or insist that it has any right to keep the partnership of Guy and Van Atta alive? Partners have the absolute right to dissolve the partnership by mutual agreement or any other manner they see fit, which is no concern of anyone except creditors of the co-partnership, so the proposition resolves itself into the single question: "was the defendant, at the time of the commencement of this action, a creditor of Guy and Van Atta?" Under the facts in this case which are admitted as a variety on a motion for a directed verdict, the defendant had parted with all of its rights to claim anything against the partnership by accepting Guy's note in payment. The defendant, not being a creditor of the partnership, it is none of its concern whether the partnership is settled. It is estopped on the face of its answer to raise the question. We must remember it is not claiming to be a tenant in common with the plaintiff, but on the contrary it pleads that it is the owner of plaintiff's interest in the notes in controversy. Not only that, but it has especially pleaded that it has foreclosed the mortgage securing these notes and is now the owner of the land; that on account of it

having bid in the land and secured a Sheriff's Deed therefor, it alleges that the notes are worthless (Paragraph X. Answer). There is not a single, solitary principle of equity pleaded in favor of defendant. It claims absolute ownership of the land under the pleading and admitted facts in this case, the defendant is a stranger to the partnership of Guy and Van Atta; it shows no contractual relations; it is not the owner of any equity that it could enforce in any court. Upon the contrary, it relies on a contract of pledge made individually with W. F. Guy while the allegations in Paragraphs VI, VII and VIII of its Answer constitute conversion as a matter of law.

The defendant offered in evidence the original complaint Paragraph VII of which reads as follows:

> "That during all of the time mentioned herein the Bank of Montana, Billings, Montana, was a banking corporation duly incorporated and existing under the laws of the State of Montana, and that some time prior to the 16th day of January, 1917, became converted from a State Bank into a National Bank, under the name of the Montana National Bank of Billings, Montana."

The defendant introduced this original complaint. It is properly in the record and is a part of the evidence and a part of the proof which is admitted as a variety under the laws for a directed verdict, which shows and proves that the Bank of Montana and the defendant are one and the same identity.

Upon a motion for a directed verdict for the defendant, all competent and revelant evidence is confessed as a variety.

Parks v. Ross 11 How 362, 13 L. Ed. 735.

Moran v. Ebey, 39 Mont. 517, 104 Pac. 522.
Lackman v. Simpson 46 Mont., 523.

STATUTE OF LIMITATIONS.

The Statute of Limitations did not begin until the service of the demand and the refusal (Exhibits 1 and 2) which was made about April 1, 1920. Plaintiff had no notice or knowledge of the sale of the notes in controversy made by the defendant on January 23, 1917, nor the foreclosure proceedings under which the defendant's claim to own the land until just previous to the commencement of this suit, which was also about the time that the demand was served. Plaintiff's cause of action did not accrue until this demand was made and denial of his rights in the property in controversy.

Section 6468 R. C. Montana, 1907, provides as follows:

> "Where a right exists but a demand is necessary to entitle a person to maintain an action, the time within which the action must be commenced, must be computed from the time, when the right to make the demand is complete."

Plaintiff's right to make this demand was not complete until he had notice and knowledge that the defendant denied his having any interest in the property involved.

The question of the statute of limitations of this case is settled beyond dispute by the case of Woods vs. Latta, 35 Montana, commencing on page 9; so that the case has been brought within less than thirty (30) days after the cause of action accrued.

It is true that defendant's exhibit 10 (Trans. P. 55) a copy of a letter purporting to have been written by

Grimstad & Brown which is dated August 31, 1916, claims that the notes in controversy had then been sold under Guy's pledge, but this letter is either a mistake, or written to mislead, because it is false. No sale had at that date been made or attempted to be made under Guy's pledge agreement. The notice of the sale is Exhibit 23 (Trans. p. 84). Guy testified as shown on page 86 of the transcript, that this notice was served upon him at or about the date it bears. This notice is dated the 16th day of January, 1917.

In paragraph VIII of defendant's answer, it is alleged that the sale under Guy's pledge agreement was made on January 23, 1917. So that the evidence and the record in this case is clear and convincing that no sale of the notes had been made as Grimstad & Brown claimed in their letter of August 31, 1916. Nor is there a scintilla of evidence in the record to the effect that the defendant, in fact made any such claim, nor is any sale under the Guy pledge relied upon by defendant, except the one made January 23, 1917.

We declare and claim most respectfully and emphatically that there is not a scintilla of evidence in this record going to show that plaintiff had any knowledge of the sale made January 23, 1917, until some time in March, 1920.

The Statute of limitations must be specially pleaded.

American Mining Co. vs. Basin Mining Co., 39 Mont. 476; 104 Pac. 525.

It is elementary that any fact which must be specially pleaded must be specially proved. Can a false claim

as made in Exhibit 10, constitute such proof as the law requires under a special plea?

Defendant will not be heard to blow hot and cold at the same time. It is in this court upon its plea, and by that plea it must stand or fall. It cannot come into this court and allege that the sale of the notes was made on January 23, 1917, and start the statute of limitations to run by showing that it made a false claim of such sale August 31, 1916.

That the learned trial Court's reasoning as shown on Page 107 of the Transcript is faulty in holding that Guy transferred equities of the partnership to the defendant, seems to us to be very clear. That there were no equities involved in the transaction is self evident. All of the evidence shows that Guy owned an undivided one-half of these Morley notes, and that the plaintiff in error owned the other half. We cannot inject into this case any imaginary equities. Before this transaction took place the Bank held these Morley notes as security for Guy and Van Atta's note and promissory notes of Van Atta which he individually owed. In this transaction those obligations were paid by Guy and he or his wife, whichever it may be, became the owner of them and succeeded to the Bank's interest in the pledged notes and he had a right to hold the pledged property as security for these obligations, but he did not do that. On the contrary he held the original debt against Van Atta as evidenced by these notes and afterwards transferred them to his wife, who, the evidence now shows, to be the owner, then he pledged the Morley notes to secure the new

debt, his individual note, and thereby his lien as pledgee by succession was lost and at that time he owned one-half of these notes, and could only pledge that half interest, which he did. In this transaction, the original debt was separated from the pledged property, and as soon as Guy pledged these notes to secure another debt, the lien as security for the original debt was lost. A pledge gives a possessory lien that can be only held for the debt for which the pledge was given.

Reynes vs. Dumont, 130 U. S. 354, 32 L. Ed. 934.

This case presents a most peculiar question; through the manipulation of Guy and the Defendant in error and its predecessor, it now claims to be the owner of plaintiff's one-half interest in the Morley notes. Mrs. Guy is the holder of his individual notes which the pledge was originally given to secure. Van Atta is liable upon these original obligations. No defense can be made against Mrs. Guy, because, whatever took place between the defendant in error and Guy it constitutes a tort upon the plaintiff in error and this cannot be pleaded either as a counterclaim or offset against Mrs. Guy's Claim. Mrs. Guy cannot be made a party to any partnership accounting. Suppose we follow the law layed down by the learned trial Court and brought suit in equity for accounting and made the defenadnt in error a party. Of course it will be conceded that unless we can make the defendant in error a party, the suit would be a mere useless proceeding. It would plead ownership on account

of the pledge and alleged sale as it has pleaded in this case. If, in that suit it failed to establish its ownership of Van Atta's one-half of these notes, its acts and claim of ownership would constitute a conversion and nothing else, so that the plaintiff in error would be relegated to his remedy at law and the case would be dismissed for the want of equity.

Where the pledgee converts the property pledged, that is, where a former tender of the debt, he refuses to surrender the property or where he makes a wrongful sale of the thing pledged, the pledgor has no remedy in equity because he has an adequate remedy at law by an action of trover or detinue.

LaCombe v. Forestall, 123, U. S. 562.
Flowers v. Stroule, 2 A. K. Marsh (Ky.) 54.
Bryson v. Rayner, 25 Md. 424, 90 Am. Dec. 69.

Upon the face of this record and the evidence which is admitted by the motion for a directed verdict, the defendant in error either owns the notes in controversy or it has converted them. That being true, the remedy we have selected is our only remedy and we are compelled to pursue it.

We respectfully submit the case and believe it should be reversed and new trial granted.

Respectfully submitted,

T. F. McCue,

Attorney for the Plaintiff.

Great Falls, Montana.